DANA FRIX
ATTORNEY-AT-LAW

SWIDLER & BERLIN
CHARTERED

ORIGINAL

DIRECT DIAL
(202)424-7662

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Comments of WinStar Communications, Inc. on Costs and Cost Recovery Issues in the Context of Number Portability
CC Docket No. 95-116

Dear Mr. Caton:

Transmitted herewith on behalf of WinStar Communications, Inc. ("WinStar"), pursuant to applicable procedures set forth 47 C.F.R. §§ 1.415 and 1.419, are an original and twelve (12) copies of its Comments in the above-referenced proceeding. In addition, two copies of the Comments is being sent to the FCC's Competitive Pricing Division, Common Carrier Bureau, and one copy of the Comments is being sent to International Transcription Services.

Also enclosed is an extra copy of this letter and Comments. Please date-stamp the extra copy and return to the undersigned in the envelope provided.

If you have any questions, please do not hesitate to call.

Very truly yours,

Dana Frix

Enclosures

cc: Competitive Pricing Division
ITS

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0412

3000 K STREET, N.W. ■ SUITE 300
WASHINGTON, D.C. 20007-5116
(202)424-7500 ■ TELEX 701131 ■ FACSIMILE (202)424-7645

Before the
Federal Communications Commission
Washington, D.C. 20054

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
	)	

COMMENTS OF WINSTAR COMMUNICATIONS, INC. ON COSTS AND COST RECOVERY ISSUES IN THE CONTEXT OF NUMBER PORTABILITY

WinStar Communications, Inc. ("WinStar"), by its undersigned counsel and pursuant to Section 1.415 of the Commission's rules, submits these comments in accordance with the Commission's July 2, 1996 Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned proceeding. WinStar is a publicly-held company (traded on the NASDAQ) which, among other things, develops, markets, and delivers local telecommunications services in the United States.[1/] The Company, through its operating affiliates, provides facilities-based local telecommunications services on a point-to-point basis using wireless, digital millimeter wave capacity in the 38 gigahertz ("GHz") band, a configuration referred to by WinStar as Wireless

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1/ WinStar is authorized to provide facilities-based telecommunications service in the nation's 43 largest metropolitan statistical areas. WinStar's operating companies have been approved to offer competitive local exchange carrier services in 11 states, and applications for such authority are pending in six additional states. In addition, WinStar's affiliates have received authority to operate as competitive access providers in 25 states, and have applications pending in ten other states. A separate WinStar subsidiary provides switched and switchless long distance services on a resale basis.

Fiber℠.[2] The passage of the Telecommunications Act of 1996 ("1996 Act" or "Act")[3] should hasten WinStar's ability to provide competitive services — particularly, local exchange services.

I. Introduction and Summary

WinStar welcomes action by the Commission on the cost allocation and recovery aspects of long-term number portability. Through this proceeding, the Commission can effectively provide economic incentives for carriers to make progress toward the permanent implementation of number portability on a nationwide basis. Simultaneously, the Commission can ensure, through this Further Notice of Proposed Rulemaking, that the transition from interim to long-term number portability is orderly and equitable for all types of carriers and consumers.

WinStar's comments on the Further Notice focus on three specific issues raised by the Commission that, if resolved inappropriately, could place unfair burdens on new entrants and hinder the development of true competition. WinStar's comments can be summarized as follows:

> **Responsibility for the Costs of Number Portability:** Referring to the plain language of section 251(e)(2) of the Telecommunications Act of 1996 ("1996 Act"), WinStar argues that the Commission has an unambiguous mandate to ensure that "all telecommunications carriers" bear the costs of number portability on a competitively neutral basis. No rational reading of this statute can alter the meaning of the term "all telecommunications carriers" to exclude a class of carriers by size, type of service, geographic area, or any other distinction. If Congress had meant to exclude a particular group—even those carriers whose customers do not use number portability—it had the knowledge and ability to include such a clause in the provision.

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[2] WinStar's Wireless Fiber℠ networks are so named because of their ability to duplicate the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions.

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("1996 Act"). Herein, "Act" refers to the Communications Act of 1934, as amended by the 1996 Act.

Allotment of Costs for Number Portability: WinStar agrees with the Commission that the most equitable and competitively neutral way to allot the recoverable costs of number portability among telecommunications carriers is on the basis of net revenues. By using gross revenues as a starting point and subtracting charges paid out to other carriers, the Commission best approximates the measure of traffic for which each individual carrier is responsible, and also ensures that the costs of number portability are based on carrier earnings from sales to end users.

Categorization of Number Portability Costs: WinStar believes that in order to implement a competitively neutral cost recovery mechanism for number portability as required by section 251(e)(2) of the 1996 Act, the Commission must only permit recovery for the costs for number portability shared by all telecommunications carriers. A carrier's individual network costs for satisfying the 1996 Act's number portability mandate should not be part of the amount that the carrier can recover from its competitors. The Commission's distinction between direct and indirect carrier-specific charges should be eliminated, since neither one should be recoverable under a competitively neutral rule. As an additional matter, the Commission should ensure that carriers cannot undermine this competitively neutral cost recovery rule by adopting additional safeguards to prevent carriers from passing costs along to other carriers inappropriately.

I. THE TELECOMMUNICATIONS ACT REQUIRES THAT ALL CARRIERS BEAR THE COSTS OF NUMBER PORTABILITY (NPRM, ¶ 209)

A reading of the plain language of Section 251(e)(2) of the 1996 Act confirms that the Commission has an unambiguous mandate to ensure that the burdens of number portability "shall be borne by *all* telecommunications carriers on a competitively neutral basis as determined by the Commission."[4/] The only discretion conveyed to the Commission by this provision is the determination of what constitutes a competitively neutral basis for the bearing of costs; the question of *which carriers* bear the costs is not at issue, but only the question of *how* they bear the costs is within the Commission's jurisdiction. Indeed, the text of the section makes clear that

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4/ 47 U.S.C. § 251(e)(2) (1996) (*emphasis added*).

every telecommunications carrier is to share the burden of costs related to number portability, albeit in some manner to be determined subsequently by the Commission.

If Congress had intended to exclude a class of carriers from the section's requirements based upon size, type of service, geographic service area, or any other distinction, it certainly possessed the knowledge and ability to do so. For example, in Section 251 of the 1996 Act, Congress offered a clear distinction between the duties placed upon "each telecommunications carrier," "each local exchange carrier," and "each incumbent local exchange carrier."[5/] In Section 251(h), Congress defined "incumbent local exchange carrier," ensuring that its distinction would be clear to readers of the statute.[6/] Absent such explicit distinctions and accompanying definitions, the term "all telecommunications carriers" in another part of the same section cannot reasonably be read to incorporate any distinctions or exclusions.

Moreover, the legislative history supports the conclusion that Congress viewed number portability as a key element in the development of a deregulated telecommunications market, and intended all telecommunications carriers to share responsibility for the costs of number portability. As the Commission noted in its Further Notice, the House of Representatives Commerce Committee concluded that "the ability to change service providers is only meaningful if a customer can retain his or her local telephone number."[7/] Thus, Congress wanted to ensure that the implementation of number portability received the financial support of all those who enjoy the

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[5/] See 47 U.S.C. §§251(a), 251(b), and 251(c), respectively.

[6/] 47 U.S.C. § 251(h) (1996).

[7/] *Further Notice,* at ¶ 2 (*quoting* July 24, 1995 House Comm. on Commerce Rept. on H.R. 1555, at 72).

benefits of this new competitive market, even if they do not participate in number portability on an individual basis.

II. THE COMMISSION'S PROPOSAL FOR ALLOTMENT OF COSTS BY NET REVENUES IS EQUITABLE AND COMPETITIVELY NEUTRAL (NPRM, ¶ 213)

The Commission is correct in its tentative conclusion (at para. 213) that the most equitable and competitively neutral way to allocate the recoverable costs of number portability among all telecommunications carriers is on the basis of net revenues. By using this mechanism to calculate individual responsibility for costs, the Commission ensures that no one carrier receives a windfall benefit from number portability to the competitive detriment of other carriers, who must absorb the costs of number portability and thereby lose a greater percentage of their return.

Other proposed calculation mechanisms are inequitable and impose competitive disadvantages on particular segments of carriers. For example, a calculation of recoverable costs based on number of lines would place an inordinate burden on local exchange carriers. Gross revenues, on the other hand, provide an appropriate starting point for the calculation of recoverable costs since, as the Commission notes, they are the "least distortionary" method of allocating costs among telecommunications carriers—each carrier's costs will approximate the amount of traffic sent over its network. In addition, as the Commission has noted in other proceedings, the subtraction of charges paid out to other carriers is proper since interconnection charges, access charges, and other carrier-to-carrier payments will still be reflected in the

underlying carrier's gross revenues.[8/] In implementing such a mechanism for calculating the allocation of recoverable costs for number portability, the Commission can guarantee that each carrier is responsible for costs only in proportion to the traffic it carries. This recoverable cost allocation mechanism is also competitively neutral in that it is based on earnings from sales to end users, rather than transfers between competitors. Thus, the Commission should approve its proposed cost allocation mechanism as the most equitable and competitively neutral means available to provide for the costs of long-term number portability.

III. THE COMMISSION'S CATEGORIZATION OF NUMBER PORTABILITY COSTS SHOULD NOT DISTINGUISH BETWEEN DIRECT AND INDIRECT CARRIER-SPECIFIC COSTS (NPRM, ¶¶ 208; 212-229)

In order to implement a competitively neutral cost recovery mechanism for number portability, as required by the 1996 Act, the Commission must only permit recovery of those costs that are shared by all telecommunications carriers. Including a carrier's individual network costs in satisfying the 1996 Act's number portability mandate in the recoverable cost calculation would undermine the principle of competitive neutrality. Competitive neutrality is not served—and incentives to minimize costs are poor—when the costs incurred by an individual carrier in altering its own operations can be imposed upon its competitors. Such a rule would give a carrier the advantage of avoiding the costs of any dilatory or inefficient action (including the purchase of inefficient technology) on its part, while leaving its competitors to shoulder the burden of covering

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[8/] *See Assessment and Collection of Regulatory Fees for Fiscal Year 1996*, MD Docket No. 96-84, FCC 96-295 (rel. July 5, 1996) (calculating common carrier fees on the basis of net interstate revenues in order to "avoid imposing any double payment burden on resellers").

these extra costs. At the same time, the inclusion of carriers' individual costs in a Commission-mandated cost recovery mechanism would threaten the Commission's longstanding policy of remaining technology neutral, because carriers would be free to make inefficient decisions regarding the technology to be deployed. This is contrary to the overarching goal of developing and sustaining a technologically sophisticated and efficient public switched network.

In the Further Notice (at para. 208), the Commission identifies three sets of costs which are potentially recoverable. They are: the nonrecurring costs incurred by the industry that are associated with implementation and development of number portability mechanisms; direct carrier-specific costs, such as purchasing number portability software; and indirect carrier-specific costs relating to network upgrade. Obviously, industry costs will have to be recovered. However, in light of the reasoning above, the Commission's distinction between direct and indirect carrier-specific charges should be eliminated, since neither one should be recoverable under a competitively neutral rule. The Commission's proposal (at paras. 221-225) to pool and spread the direct carrier-specific costs of number portability on a regional basis undermines the principles of competitive neutrality since the same poor incentives and competitive and equitable considerations discussed above apply to both direct and indirect carrier-specific costs. While the degree of relation to number portability implementation may be different, WinStar sees little difference in the competitive ramifications and incentives involved in installing switch software (a "direct" carrier-specific cost) or other general system upgrades ("indirect" carrier-specific costs") to comply with the number portability mandate. A carrier's own internal response to number portability—a process over which no other carriers or the Commission have control—could be imposed upon others with little regard to efficiency or equity if direct carrier-

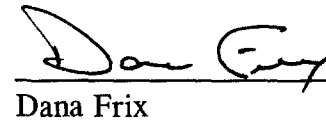
specific costs are recoverable. The Commission should, therefore, rule that only shared or common costs to implement number portability are, in fact, recoverable costs.

As an additional matter, the Commission should ensure that carriers cannot undermine this competitively neutral cost recovery rule by adopting additional safeguards in either this docket or a related proceeding. Such safeguards should include a prohibition on the recoupment of unrecoverable carrier-specific costs by passing those costs through to competitors through increased access charges, interconnection charges, or other carrier-to-carrier payments. Without such safeguards, carriers will still be able to transfer its direct and indirect carrier-specific number portability costs to its competitors under the rubric of increased access charges or interconnection charges. Such a transaction would not only foil the competitively neutral goals of this proceeding, but also subvert the Commission's efforts in other proceedings to ensure that access charges and the like are cost-based in nature.

CONCLUSION

For the foregoing reasons, WinStar respectfully requests that the Commission adopt rules consistent with the principles discussed herein.

Respectfully submitted,



Dana Frix
Katherine A. Rolph
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7662 (Tel)
(202) 424-7645 (Fax)

Counsel for WinStar Communications, Inc.

Timothy R. Graham, Esq.
Robert Berger, Esq.
Joseph M. Sandri, Jr., Esq.
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

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